

WILLIAM AUBERY.

FEBRUARY 11, 1860.—Reported from the Court of Claims, committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

WILLIAM AUBERY *vs.* THE UNITED STATES.

1. The petition of claimant.
2. Claimant's original evidence transmitted to the House of Representatives.
3. Claimant's brief.
4. United States solicitor's brief.
5. Opinion of the court adverse.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the
[L. S.] seal of said court, at Washington, this 5th day of December,
A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE COURT OF CLAIMS.

WILLIAM AUBERY, claimant, *vs.* THE UNITED STATES.

To the honorable judges of the Court of Claims of the United States:

The petition of William Aubery, of Dundee, in the county of Beauharnois, in Canada East, begs leave respectfully to represent unto this honorable court that he is interested in, and is the owner of, a claim which he has against the United States, arising from the consideration that on or about the 2d day of March, A. D. 1813, the United States

pressed into its service, belonging to him, one span of horses, sleigh, and harness, with himself, and employed them in transporting troops and military stores from Alburg, Vermont, to Plattsburg and to Sackett's Harbor, and detained them thirty-two days, and so used them that one of said horses died; and for this service and loss your petitioner claims that he is justly entitled to be paid \$110, the value of said horse, and the destruction and loss of the sleigh, which he valued at \$25, beside the interest from the time of said loss, and therefore prays this honorable court will examine and hear said claim, and such proof as he may have to offer in support thereof, and that they report a bill to Congress for the payment of said claim. And your petitioner, as in duty bound, will ever pray.

WILLIAM AUBERY.

DUNDEE, *August 7, 1855.*

CANADA EAST, *Beauharnois County, ss:*

William Aubery, of Dundee, in the county of Beauharnois, Canada East, being duly sworn, doth depose and say that the petition above by him subscribed contains the truth, according to the best of his information and belief.

WILLIAM AUBERY.

Sworn and subscribed before me this 7th day of August, A. D. 1855.

CHARLES JOHNSON,
Justice of the Peace.

COURT OF CLAIMS.

WILLIAM AUBERY, claimant, *vs.* THE UNITED STATES.

Interrogatories and cross-interrogatories to be administered to George Weekes, a witness offered on the part of the complainant in the above entitled cause, and answers written down and taken by the United States commissioner of this court appointed for the county of Clinton, in the State of New York, to be used on the trial of this action:

Direct examination.

1st. Do you know the parties, or either of them, entitled in this action?

2d. Do you know that the complainant ever performed any service for the United States? If so, state the time and place and all the circumstances attending the same; whether it was voluntary or not; what sort of team he used; if it was his, and how it was used or abused; what injury befel it in the service, and by whose fault; its value, and the number of days employed, and from where and to where it was forced or taken.

3d. Who were the agents, and for whom were they acting, in the impressment of teams, and for what service?

Lastly. State all and any other matter you may know.

C. H. AVERILL,
Attorney for Claimant.

Cross-examination.

No questions at present. If after the deposition comes in the government thinks it necessary to re-examine the witness, the right to do so is reserved.

D. RATCLIFFE,
Assistant Solicitor of the Court of Claims.

COURT OF CLAIMS.

WILLIAM AUBERY, claimant, *vs.* THE UNITED STATES.

Interrogatories and cross-interrogatories to be administered to Richard Steenburg, a witness offered on the part of the claimant in the above entitled action, and answers to be written down and taken by the United States commissioner of this court appointed for the county of Clinton, in the State of New York, to be used on the trial of this action:

Direct examination.

1st. Do you know the parties, or either of them, entitled in this action?

2d. Do you know that the claimant ever performed any service for the United States? If so, state the time and place and all the circumstances attending the same; whether it was voluntary or otherwise; what team he used; if it was his, and how it was used and abused; what injury befel it in the service, and by whose fault; its value, and the number of days it was engaged in the service; and its value per diem.

3d. In what manner did he enter the service, and by whom or what agents was his team impressed; and for what service, and where did the team go to; and if it sustained any injury, how did it occur; and what amount of damage was it to the owner?

Lastly. If you know any other matter or thing to which you have not been interrogated, state it freely as far as you know.

C. H. AVERILL,
Attorney for Claimant.

Cross-examination.

No questions at present. If after the deposition comes in the gov-

ernment thinks it necessary to re-examine the witness, the right to do so is reserved.

D. RATCLIFFE,
Assistant Solicitor of the Court of Claims.

COURT OF CLAIMS.

WILLIAM AUBERY, claimant, vs. THE UNITED STATES.

Depositions of George Weekes and Richard Steenburg, witnesses produced, sworn, and examined on oath, on the 25th day of October, A. D. 1858, at my office, in the town of Champlain, in the county of Clinton and State of New York, by virtue of the annexed *consuits* or stipulations.

George Weekes, of Rouse's Point, in the county of Clinton, in the State of New York, aged sixty-seven years, a witness produced, sworn, and examined on the part and behalf of the claimant, William Aubery, deposeth and saith as follows:

Imprimis to the first interrogatory this deponent saith or answers: I know the parties.

To the second interrogatory he answers: I, in March, 1813, was residing in Champlain, New York, and the complainant was residing in Alburg, Vermont, about four miles distant. A lieutenant, wearing the uniform of a United States officer in the regular army, and eight United States soldiers, wearing the uniform of the United States, on or about the 2d day of March, 1813, came to my house and pressed my team, ordered it brought out, and got into it; then ordered me to drive them to Alburg, Vermont, which I did. On our arrival the said officer proceeded to press teams, and among others pressed the two-horse team, sleigh, and harness belonging to William Aubery, a farmer of Alburg. The owners had the privilege of driving their own teams or sending drivers with them, and where no driver was furnished, the teams were driven by any one the officer put over them. The complainant chose to go with his own team. He was then ordered to drive to Champlain, and from Champlain to Plattsburg, and on their arrival there were placed under military orders. He remained there several days, until the United States army, under General Pike, was ready to move. A portion of the command of General Pike was then loaded into his sleigh, drawn by two good horses, the property of the complainant, and they proceeded to transport them to Sackett's Harbor, where he discharged his load, and on returning to Watertown was allowed to return home. I was in company all the way going and returning, until claimant's horses gave out at Canton, and one of them died. I know the horses were abused for want of sufficient provender, and forced along beyond their strength by overloading, and I have no doubt the horse came to his death by hard service and usage, without any fault of the owner, but from the necessity and emergency to keep up with the movements of the army. I value the horse that died at \$110, and the sleigh, which was broken and left behind, at

\$25. According to my best recollection, he was absent in the United States service thirty-two days, in transporting a portion of the United States army, under the command of General Pike, to Sackett's Harbor.

To the third interrogatory he answers: I have forgotten the name of the officer who pressed the teams, but on their arrival at Plattsburg they were under the orders and command of General Pike, and continued under his orders until dismissed at Watertown.

To the last interrogatory he answers: That he knows of no other matter or thing pertinent to the issue, except that he is sixty-seven years old, is not related to claimant, and has no interest in this claim. Has resided the past year at Rouse's Point.

GEORGE WEEKES.

Subscribed and sworn to before me October 25, 1858.

H. G. ROBBINS,
Commissioner of the United States Court of Claims.

COURT OF CLAIMS.

WILLIAM AUBERY, claimant, *vs.* THE UNITED STATES.

Depositions of George Weeks and Richard Steenburg, witnesses produced, sworn, and examined on oath, on the twenty-fifth day of October, A. D. 1858, at my office in the town of Champlain, in the county of Clinton and State of New York, by virtue of the annexed contracts and stipulations.


Richard Steenburg, of Duane, in the county of Franklin, in the State of New York, aged 71 years, a witness produced, sworn, and examined on the part and behalf of claimant, William Aubery, deposeth and saith as follows:

Imprimis to the first interrogatory he answers: I know the parties.

To the second interrogatory the said Richard Steenburg answers: I, in the month of March, A. D. 1813, was a resident of Alburg, Vermont, and neighbor to the claimant, who was the owner of a span of horses, sleigh, and harness. On or about the 8th of March, 1813, a United States officer and eight soldiers, in the sleigh driven by George Weeks, came to Alburg and proceeded to press teams into the United States service, and among others pressed the two-horse team, sleigh, and harness belonging to the claimant, and two teams belonging to the deponent, and ordered them to be driven to Champlain and from thence to Plattsburg, where they were put under military control and kept there until General Pike ordered the army to move west, when a portion of General Pike's command was ordered into the sleigh drawn by the horses of claimant, and they proceeded to Sackett's Harbor with them, and on returning to Watertown were dismissed and returned home, after being absent in the United States service thirty-two days. I went in company with claimant to Sackett's Harbor and returned home with him, and know that one of his horses died of hard usage in this service, from overloading and pushing the team beyond its strength, with lack of fodder, and exposure standing

out nights; that said horse failed at Canton in returning, where claimant was obliged to leave his sleigh broken and worthless from hard usage. I value the horse lost in this service at one hundred and ten dollars, and the sleigh at twenty-five dollars. The per diem allowance was three dollars per day, and found.

To the last interrogatory he answers: I know of no other matter or thing in this behalf; am not related to the claimant, and have no interest in this claim, and for the last two months have been a resident of Duane, Franklin county, New York, and a year previous thereto was a resident of Stockholm, St. Lawrence county, New York.

his
RICHARD  STEEMBURG.
mark.

Subscribed and sworn to before me October 25, 1858.

H. G. ROBBINS,
Commissioner of the United States Court of Claims.

STATE OF NEW YORK, *County of Clinton, ss:*

On this twenty-fifth day of October, A. D. 1858, personally came George Weeks and Richard Steenburg, the witnesses within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within depositions were written down by the commissioner and then proposed by him to the witnesses; and the answers thereto were written down by the commissioner in the presence of the witnesses, who then subscribed in the presence of the commissioner. The depositions of George Weeks and Richard Steenburg, taken at the request of William Aubery, to be used in the investigation of a claim against the United States now pending in the Court of Claims in the name of said Aubery. The above party was notified, did not attend, and did not object, but reserved the right to cross-interrogatories on the coming in of the answers.

H. G. ROBBINS,
Commissioner of the United States Court of Claims.

IN THE COURT OF CLAIMS.

No. 319

WILLIAM AUBERY *vs.* THE UNITED STATES.

CLAIMANT'S POINTS AND BRIEF.

Statement.

General Pike, the agent of the United States, in command of the United States army on the northern frontier at Plattsburg, in the

war of 1812 sent out United States soldiers with an officer from his command to impress teams for transporting his army to Sackett's Harbor, and among others impressed the team of claimant, and so used them that one of the horses died, and destroyed the sleigh, and paid only for his services, leaving the injury to his horse and sleigh unpaid.

For this injury the United States are liable, which is stated in detail in the evidence of George Weekes, in his answers to 2d and 3d interrogatories, at pages 5 and 6 of the Record, and Richard Steenburg's evidence and answer to 2d interrogatory, at page 7 of the Record.

The injury proved stands thus:

To value of horse.....	\$110 00
“ “ sleigh.....	25 00
	<hr/>
	135 00
	<hr/>

The grounds of the liability of the United States are—

I. The impressment was the act of the authorized agent of the United States, who was carrying on a war with Great Britain; and in support of the fact of agency, reference is made to the 2d volume of “American Military and Naval Heroes,” page 23, from which the following is extracted:

“Immediately after the declaration of war, Pike was stationed with his regiment upon the northern frontier, and, upon the commencement of the campaign of 1813, was appointed a brigadier general.”

At page 24: “He was selected for the command of the land forces in an expedition against York, the capital of Upper Canada, and on the 25th of April sailed from Sackett's Harbor.”

“Building barracks for General Pike's troops at Plattsburg, December, 1812,” &c. (Am. State Papers, Claims, p. 874.)

“It follows that the nation is liable for the acts of such agents as it sees fit to employ in the prosecution of its object.” Per Gilchrist, P. J., in the case of *The Owners of the brig Armstrong vs. The United States*. (See Devereux's Reports, p. 172.)

II. It being the act of the United States, the fifth article of the amended constitution of the United States secures to the owner just compensation for property taken for public use. (See U. S. Statutes at Large, vol. 1, p. 21.)

The just compensation meant is to make whole; and this cannot be done without applying the same remedy against the United States that the claimant could legally exact in an action of trover from an individual who converts the property of another, with interest from time of conversion.

III. It is the custom of Congress to provide for such claims. (See the following special acts: Henry Knowles, (impressment,) 24th Cong., 1st sess., Feb. 17, 1836; A. J. King, (impressment,) 26th Cong., 1st sess., July 21, 1840, 6; Andrew Moore, (impressment,) Feb. 5, 1833; Theophilus Cooksey, (impressment,) 21st Cong., 1st

sess., Jan. 30, 1830; David Fielding, (impressment,) 19th Cong., 2d sess., March 2, 1827.)

C. K. AVERILL,
Attorney for Claimant.

IN THE COURT OF CLAIMS.

WILLIAM AUBERY *vs.* THE UNITED STATES.

SOLICITOR'S BRIEF.

Claim for loss of a horse and sleigh impressed into the service of the United States at Alburg, Vermont, in March, 1813.

MATERIAL FACTS AS UNDERSTOOD BY THE SOLICITOR.

First. An officer of the United States army pressed into the military service of the United States the plaintiff's horses and sleigh to transport troops from Alburg, Vermont, to Plattsburg and Sackett's Harbor, New York, early in March, 1813, and that he was absent 32 days. (*Depositions of Weeks and Steenburg*, Record, pp. 6, 7.)

Second. That one of plaintiff's horses failed at Canton, (in St. Lawrence county, N. Y.,) and he left his sleigh there, which had been broken, and he returned home with his horses without it.

Steenburg testifies "that said horse failed at Canton in returning, where claimant was obliged to leave his sleigh broken and worthless from hard usage." (Record, p. 7.)

Weeks testifies: "I was in company all the way in going and returning, until claimant's horses gave out at Canton, and one of them died." (Record, p. 6.)

Weeks does not state when nor where the horse died, nor does Steenburg, but the inference is that he died after plaintiff reached home.

Third. There is no evidence that the plaintiff objected to the manner or extent of the use of his sleigh and horses, nor to the quantity or quality of the food supplied.

Fourth. There is no evidence of the size or weight of the load which plaintiff's team drew, nor that he was compelled to take an improper load.

Fifth. There is no evidence of what disease the horse died, nor any as to the former condition of the horse, nor any as to the former condition of the sleigh, nor that it was broken by being overloaded or otherwise improperly used, or that it was injured while in actual use; but it is highly probable that the snow was gone, or nearly so, at the time of the return, and the sleighing bad, or entirely gone, and that this fact had much to do with wearing down the teams and wearing out the sleighs in returning, if not in going to Sackett's Harbor.

Sixth. The petition does not, at least clearly, claim that the plaintiff was not paid a per diem for himself and horses, but it is clearly inferrible from that and Steenburg's evidence that he was paid three dollars per day for the time he was absent.

Seventh. There is no evidence that this claim has ever been presented to the proper department for payment, or to Congress for relief.

LEGAL PROPOSITIONS.

FIRST. *There is no existing law under which the plaintiff can be paid for the loss of his horse or the damage to his sleigh.*

The act of 1816 is not in force, nor is there any other which is applicable. This is conceded by the plaintiff in his brief. But he claims (as several others do in similar cases) under the fifth amendment of the Constitution, which reads:

“Nor shall private property be taken for public use without just compensation.”

There are three answers to this:

1. The plaintiff received his compensation at the time, and it is presumed to have been just, as there is no evidence of complaint at the time.

2. The damages now claimed are not for the value of property taken, but for losses which are claimed, but not sufficiently proved, to have resulted from use, which was paid for before the losses occurred, and therefore is not within the provision quoted.

3. This provision in the Constitution cannot be executed without legislation by Congress providing the mode, manner, and means of doing so.

The Constitution simply lays down a most valuable general rule, and imposes a salutary duty upon the legislative branch of the government, requiring it when it provides for taking private property for public use, that it shall also make provision for making just compensation. Taking private property without making such compensation is a tort for which those committing it are personally responsible. If, in the present case, those who impressed plaintiff's team did not make compensation for the use that they received, then they were personally liable for the tort. It is to be presumed that the government supplied them with the necessary funds, which it was their duty to apply to that purpose, and until the contrary is fully proven, it is to be presumed they did so.

If no adequate provision was made to compensate the party when his property had been taken for public use, the duty rests upon the legislative branch to make laws providing the means and regulating the compensation. Without statute laws applicable to the case, neither the executive officers nor the courts can now apply a remedy.

If the Constitution alone furnishes the remedy, then the proper executive officers can apply that remedy, and there is no necessity of applying to this court. If they cannot administer relief without legislation, then, clearly, this court cannot. This court cannot award compensation as wrongfully withheld, when the proper executive officers could not rightfully make such compensation. If the plaintiff is constitutionally entitled to relief, it is at the hands, not of this court, but of the legislature.

The federal Constitution contains many provisions which cannot be

practically applied and rendered effectual without legislation by Congress to put them in operation.

Nearly all the judicial power provided in the Constitution requires legislation to carry it into effect. The provision concerning fugitives from service or labor is of the same class. Such also is the provision guaranteeing each State a republican form of government, and protecting the States against domestic violence. The same is true of many other provisions. Congress, as well as the State legislatures, has enacted laws for the purpose of carrying out and practically applying constitutional provisions. When the Constitution lays down a fundamental provision, it is usually necessary for Congress to enact detailed provisions to render it effective in practice.

This question has been before the Supreme Court in *Groves vs. Slaughter*, (15 Peters, 449,) where a provision of the constitution of the State of Mississippi was under consideration. The provision was this: "The introduction of slaves into this State as merchandise or for sale shall be prohibited from and after the first day of May, 1833." The suit was upon a note for slaves introduced and sold as merchandise in that State after that date. The court held that legislation was required in order to execute the act, and until provision was made declaring the effect and consequence of such introduction, the vender could recover upon notes given upon such sale. The opinion of the court was given by Judge Thompson, of New York. At page 499, he said: "The question arising under the constitution of Mississippi is whether this prohibition, *per se*, interdicts the introduction of slaves as merchandise, or for sale, after a given time, or is only directory to the legislature, and requiring their action in order to bring it into full operation, and render unlawful the introduction of slaves for sale."

It was held: "Admitting the constitution is mandatory upon the legislature, and that they have neglected their duty in not carrying it into execution, it can have no effect on the construction of this article. Legislative provision is indispensable to carry into effect the object of this prohibition."

Large portions of the opinion have a direct bearing upon the present question.

It follows that, for want of legislative action under the provision of the constitution in question, no recovery can be had under it. Admitting, for the purposes of argument, that all the facts set up by the plaintiff are true, and that the Constitution has been violated by impressing the teams, he can have no relief until Congress enacts a law under which compensation can be made for such a tort. The wrong may have been committed, but there is no remedy provided under the Constitution or laws which will enable him to recover in this court. There is no act of Congress, or contract, or regulation of a department, which entitles him to what he demands. The act of 1814 provided a temporary remedy for many cases, and no other of a general character has since been enacted. Consequently, the plaintiff cannot recover. (See *Rogers vs. Bradshaw*, 20 John. R., 735, and *Livingston vs. The Mayor of New York*, 8 Wen., 85, which were cases arising under the constitution of New York.)

SECOND.—*This is a stale claim, and has never been presented to the department, nor pay demanded, and it is presumed to have been paid.*

This question has been so fully discussed in the solicitor's briefs in other cases (Steenburg's and Valentine's) that it is deemed unnecessary to repeat what was said in those cases.

THIRD.—*Interest is not allowable.*

This question has been so fully discussed in numerous cases that it is not deemed proper to renew the discussion.

R. H. GILLET,
Solicitor.

MARCH 22, 1859.

IN THE COURT OF CLAIMS.

JUNE 6, 1859.

WILLIAM AUBERY *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the court.

The petitioner states that on or about the 2d day of March, A. D. 1813, the United States pressed into their service, belonging to him, one span of horses, sleigh, and harness, with himself, and employed them in transporting troops and military stores from Alburg, Vermont, to Plattsburg and to Sackett's Harbor, and detained them thirty-two days, and so used them that one of the horses died. He claims that he is justly entitled to be paid \$110, the value of the horse, and the destruction and loss of the sleigh, which he valued at \$25, besides interest.

George Weeks, a witness on the part of the petitioner, testifies as follows:

"I, in March, 1813, was residing in Champlain, New York, and the complainant was residing in Alburg, Vermont, about four miles distant. A lieutenant, wearing the uniform of a United States officer in the regular army, and eight United States soldiers, wearing the uniform of the United States, on or about the 2d day of March, 1813, came to my house and pressed my team; ordered it brought out and got into it; then ordered me to drive them to Alburg, Vermont, which I did. On our arrival the said officer proceeded to press teams, and, among others, pressed the two-horse team, sleigh, and harness belonging to William Aubery, a farmer of Alburg. The owners had the privilege of driving their own teams, or sending drivers with them, and where no driver was furnished the teams were driven by any one the officer put over them. The complainant chose to go with his own team. He was then ordered to drive to Champlain, and from Champlain to Plattsburg, and on their arrival there were placed

under military orders. He remained there several days, until the United States army, under General Pike, was ready to move. A portion of the command of General Pike was then loaded into his sleigh, drawn by two good horses, the property of the complainant, and they proceeded to transport them to Sackett's Harbor, where he discharged his load, and, on returning to Watertown, was allowed to return home. I was in company all the way, in going and returning, until claimant's horses gave out at Canton, and one of them died. I know the horses were abused for want of sufficient provender, and forced along beyond their strength by overloading; and I have no doubt the horse came to his death by hard service and usage, without any fault of the owner, but from the necessity and emergency to keep up with the movements of the army. I value the horse that died at one hundred and ten dollars, and the sleigh, which was broken and left behind, at twenty-five dollars. According to my best recollection, he was absent in the United States service thirty-two days in transporting a portion of the United States army, under the command of General Pike, to Sackett's Harbor."

"I have forgotten the name of the officer who pressed the teams, but on their arrival at Plattsburg they were under the orders and command of General Pike, and continued under his orders until dismissed at Watertown."

Richard Steenburg, also a witness on the part of the petitioner, testified as follows:

"I, in the month of March, A. D. 1813, was a resident of Alburg, Vermont, and a neighbor to the claimant, who was the owner of a span of horses, sleigh, and harness. On or about the 8th of March, 1813, two United States officers and eight soldiers, in a sleigh driven by George Weekes, of Champlain, came to Alburg and proceeded to press teams into the United States service, and among others pressed the two-horse team, sleigh, and harness belonging to the claimant, and two teams belonging to deponent, and ordered them to be driven to Champlain, and from thence to Plattsburg, where they were put under military control, and kept there until General Pike ordered the army to move west, when a portion of General Pike's command was ordered into the sleigh drawn by the horses of claimant, and they proceeded to Sackett's Harbor with them, and on returning to Watertown were dismissed, and returned home, after being absent in the United States service thirty-two days. I went in company with claimant to Sackett's Harbor, and returned home in company with him, and know that one of his horses died of hard usage in this service from overloading and pushing the team beyond its strength, with lack of fodder, and exposure standing out nights; that said horse failed at Canton in returning, where claimant was obliged to leave his sleigh, broken and worthless from hard usage. I valued the horse lost in this service at one hundred and ten dollars, and the sleigh at twenty-five dollars. The per diem allowance was three dollars per day and found."

This is all the evidence in this case.

The petition in this case was filed in the year 1855, more than forty-two years after the claim originated, and the depositions were taken

in the year 1858, three years thereafter. After so great a lapse of time, to require the United States to contest a claim like this is unreasonable and unjust. It is of such a character that, even if it were of recent occurrence, there would be much difficulty in determining whether the death of the horse was occasioned by the negligence of the United States ; but after the lapse of nearly half a century no investigation could be made from which a just result could reasonably be expected.

Our opinion is that the petitioner is not entitled to relief.

